

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

March 5, 2009

Tyrone Drummond
SBI #
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. Drummond, Def. ID# 060622334 (R-2)

DATE SUBMITTED: February 13, 2009

Dear Mr. Drummond:

Defendant Tyrone Drummond (“defendant”) has filed, pursuant to Superior Court Criminal Rule 61 (“Rule 61”), his second motion for postconviction relief in this case. Several procedural bars apply and defendant has failed to present any exceptions to overcome the bars. Thus, I deny the pending motion.

On October 26, 2006, a jury found defendant guilty of delivery of cocaine and possession of drug paraphernalia. The testimony established that after an undercover police officer and a confidential informant approached defendant about buying crack cocaine, defendant took them to his cousin’s house where the transaction was completed.

Defendant appealed his conviction and sentence to the Supreme Court. He advanced the following arguments on appeal:

a) the jury was biased in favor of the State’s witnesses because they are State

troopers; b) there was insufficient evidence presented at trial to support his convictions; c) an unidentified informant's failure to appear at trial violated his constitutional right of confrontation; d) the chain of custody of the physical evidence was broken; and e) the Superior Court imposed an excessive sentence.

Drummond v. State, 931 A.2d 436, 2007 WL 2066788, * 1 (Del. July 19, 2007) (TABLE). The Supreme Court determined that each argument was meritless and affirmed the judgment of the Superior Court. *Id.* The mandate was dated August 6, 2007.

Defendant thereafter filed a motion for postconviction relief. He argued trial counsel was ineffective in a number of ways. One ground was with regard to the chain of custody issue. This Court denied his motion. *State v. Drummond*, Del. Super., Def. ID# 0606022334 (R-1), Stokes, J. (April 30, 2008). On appeal, the Supreme Court ruled defendant's appeal was without merit and affirmed the Superior Court's decision on the postconviction motion. *Drummond v. State*, 962 A.2d 916, 2008 WL 4989125 (Del. Nov. 25, 2008) (TABLE).

On February 12, 2009, defendant filed his second motion for postconviction relief. In that motion, he sets forth two grounds for relief. They are: 1) "Chain of Custody of the physical evidence was broken between the time the drugs were seized during control buy and the time the evidence bag was received by the Office of the Chief Medical Examiner in Wilmington, Delaware" and 2) "State's primary witness committed perjury to obtain probable cause to arrest." He provides the following statement to support his effort to overcome the procedural bars of Rule 61(i) :

Under the law of the case doctrine exceptions pursuant to Superior court [sic] Criminal Rule 61(i) (4), this Court is not precluded from reexamining prior ruling [sic] where reconsideration of the claims is will [sic] prevent an injustice because (1) Chain of Custody of the physical evidence was broken between the time the drugs were seized during control buy and the time the evidence bag was received by the Office of the Chief Medical Examiner in Wilmington, Delaware

and (2) State's primary witness committed perjury to obtain probable cause to arrest.

The first step the Court takes is to determine if any of the procedural bars of Rule 61(i) preclude a consideration of defendant's claims. In the applicable version of Rule 61(i), it is provided as follows:

Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

The motion is time-barred since it was filed beyond one year after the judgment of conviction was final, which was August 6, 2007, the date of the mandate on the appeal. Super. Ct. Crim. R. 61(i)(1) and (m).¹ Defendant also has raised, unsuccessfully, the chain of custody

¹In Superior Court Criminal Rule 61(m), it is provided in pertinent part:

Definition. A judgment of conviction is final for the purpose of this rule as follows:

argument twice before, in the direct appeal and in his first postconviction motion. Thus, this claim is barred pursuant to Rule 61(i) (4). Defendant's perjury claim, which he failed to raise on appeal or in his previous Rule 61 motion, is barred pursuant to Rule 61(i) (2) and (3).

Defendant's only attempt to overcome the bars is to state that the interest of justice requires consideration of the two claims.

The "interest of justice" exception would provide defendant relief from the bars contained in Rule 61(i) (2) and (4). That exception is a narrow one. To invoke that exception, defendant must show that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him." *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990). He has failed to make such a showing. Thus, this exception does not apply.

In order to overcome the bars of Rule 61(i) (1), (2) and (3), defendant must show that he had "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." Rule 61(i) (5). However, that fundamental fairness exception also is a narrow one and has been applied only in limited circumstances. *Younger v. State*, 580 A.2d 552, 555 (Del. 1990). An example of such a circumstance is "when the right relied upon has been recognized for the first time after the direct appeal." *Id.* Defendant has asserted nothing which would bring his claims within that exception.

Finally, with regard to the first-time asserted claim that the witness committed perjury, in addition to not establishing the miscarriage of justice exception, defendant has not made any

(2) If the defendant files a direct appeal ..., when the Supreme Court issues a mandate or order finally determining the case on direct review....

attempt to show cause for his failure to timely raise the issue on appeal or actual prejudice resulting from the alleged error as Rule 61(i)(3) requires.

In light of the foregoing, I deny defendant's claims as procedurally barred.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
John W. Donahue, IV, Esquire
Office of the Public Defender